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No. 93-1572

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

GERONIMO VILLEGAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent does not dispute that he loaded his car with vials filled with human blood, some of which were contaminated with the hepatitis-B virus, that he drove his car to the banks of the Hudson River, and that he then took the vials out of the car and disposed of them in the navigable waters. Respondent likewise does not dispute (Br. in Opp. 24) that his conduct is covered by the Clean Water Act if that conduct is "any addition of any pollutant to navigable waters from any point source"—*i.e.*, from "any discernible, confined and discrete conveyance." 33 U.S.C. 1362(12) and (14). Respondent contends, however, that "a personal automobile" is not a "conveyance." Br. in Opp. 24-25, 27. In the alternative, he contends that the discharge did not occur "from" the automobile, but

"from" his hand. Br. in Opp. 25. Those claims are so inherently implausible that they simply highlight the error committed by the Second Circuit.

2. Respondent claims that "a personal automobile" (Br. in Opp. 24) is not a "conveyance," because the Clean Water Act purportedly is directed only to "*fixed* outlets of pollutants at *fixed* industrial or municipal plants." See Question Presented in Br. in Opp. (emphasis added). The notion that a car—personal or otherwise—is not a "conveyance" is so flatly contrary to the ordinary understanding of English that anyone advancing it bears a special burden of justification, which respondent's extended discussion of the general purposes of the Act (Br. in Opp. 29-36) simply does not provide.

In ordinary parlance, a conveyance is "a means of transportation," *Webster's Third New International Dictionary* 499 (1986), or "a means or way of conveying * * * or passing (as from place to place)," *ibid.*, and therefore the term most certainly includes an automobile. The Act itself confirms that that ordinary meaning is intended, since it gives a non-exhaustive list of covered "conveyance[s]," including "container[s]," "rolling stock," [*i.e.*, a railroad's wheeled vehicles], and "vessel[s] or other floating craft." 33 U.S.C. 1362(14). The Act thus directly refutes respondent's attempt to limit the "point source" concept to "fixed" outlets of pollution at "fixed" industrial or municipal plants.

That conclusion is not changed by respondent's observation (Br. in Opp. 32-33 & n.21) that *other* provisions of the Act impose certain requirements on "point sources" that appear to contemplate that those requirements will be imposed on industrial plants.

The term "point source" is expressly defined by the Act; a point source is "*any* discernible, confined and discrete conveyance." 33 U.S.C. 1362(14) (emphasis added). Since the "point source" concept is defined in the Act, there is no reason to seek its meaning from the various contexts in which "point source" is used in the Act. Moreover, the inapplicability of the full range of statutory provisions to a given conveyance is not a reason for concluding that the conveyance is *never* a "point source." Cf. *United States* v. *Turkette*, 452 U.S. 576, 585 (1981) (the fact that some provisions of RICO do not apply to all RICO enterprises does not mean that those entities are not "enterprises").

3. Respondent alternatively contends (Br. in Opp. 25) that "even if a personal automobile could be deemed a 'point source' * * * the conduct would still not be within the Clean Water Act[,] because respondent took the vials out of the car before they came anywhere near the navigable waters." That fact leads respondent to claim that his continuous conduct in dumping the vials from the car into the water was not a discharge "from" the car, but only a discharge "from" his person. As petitioner notes (Br. in Opp. 25-26 & n.14), the Second Circuit implicitly took that view, which then made it necessary for that court to decide whether a human being can be "a point source" under the statute.[1] The court of appeals, however,

[1] While the court of appeals devoted the bulk of its opinion to the question whether a human being can be a point source, and resolved that issue erroneously, this Court need not reach that question unless it agrees with respondent's claim that the blood vials were not added to the water "from" his car. If the Court were to so conclude, respondent would be entitled to a judgment of acquittal only if the Court *also* concludes that a

erred in believing that there was no discharge "from" respondent's automobile.

In ordinary parlance, the preposition "from" is "used as a function word to indicate a starting point: as * * * a point or place where an actual physical movement (as of departure, withdrawal, or dropping) has its beginning." *Webster's Third New International Dictionary* 913 (1986). It is perfectly sensible to speak of respondent's car as the "starting point" of the "physical movement" of the vials to the water. Indeed, while a particular contextual use may indicate that a more limited meaning is intended, nothing in the ordinary meaning of the preposition "from" necessarily requires that it be confined to a *single* starting point. One would ordinarily say that an object fell to the ground "from" the top of a ten-story building even if the object hit one of the awnings on its way down, and even if it would also be accurate to say in those circumstances that the object fell "from" the awning. Similarly here, it is quite accurate to say that the vials filled with human blood were added

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human being can *never* be a "point source." If a person can be a "point source," and we contend that the district court was correct to conclude so (Pet. App. 38a-39a), respondent's convictions must be affirmed. Contrary to respondent's claim (Br. in Opp. 13-14), the general rule that a conviction may not be affirmed on a theory not presented to the jury, see *Chiarella* v. *United States*, 445 U.S. 222, 236 (1980), does not help him here, because no jury that found respondent guilty on the theory that his car was the "point source" could fail to convict him on the alternative theory—*i.e.*, the jury already necessarily found that respondent threw the vials in the water. Thus, failure to advise the jury that respondent was the "point source," if that was required, was harmless beyond a reasonable doubt. See, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497, 501-504 (1987).

to the water "from" respondent's car, even if it would also be accurate to say that the vials were discharged "from" respondent's hand. Respondent therefore is quite wrong to suggest (Br. in Opp. 25-26 & n.14) that by using the word "from" the Act necessarily requires that the pollutant enter the water *directly* from the point source (here, presumably, by being pitched *by hand* directly into the water from within the car).

Respondent's contrived interpretation of the word "from" derives no support from *National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), on which he heavily relies. See Br. in Opp. 26-27. The issue in that case was whether the Environmental Protection Agency was required to regulate under Section 402 of the Act certain changes in water quality that occurred naturally in certain dams, such as a low level of dissolved oxygen in the deep strata of reservoirs as a result of their being too deep to be aerated by wind.[2] The court upheld the agency's view that there was no *addition* of a pollutant from a point source when the purportedly polluted water passed through the dam (a point source) "into the formerly unpolluted river below." 693 F.2d at 174-175. Because the "pollutants" were already present in the navigable waters, there was simply no "*addition* from a

[2] Because it involved Section 402 of the Clean Water Act, the issue in *National Wildlife Federation* differed from the issue recently addressed by this Court in *Jefferson County PUD* v. *Ecology Dep't*, No. 92-1911 (May 31, 1994). *Jefferson County PUD* involved Section 401 of the Act, which requires state water quality certification for any federal permit applicant whose activities may cause "any discharge into the navigable waters" whether by pollutants *or otherwise*.

point source [which] occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 175 (emphasis added). Thus, *National Wildlife Federation* simply did not address, much less endorse, the proposition for which respondent cites it; it merely held that the dam could not be deemed to have "added" to the water what was already in the water before the water passed through the dam. By contrast, the blood vials that respondent discharged from his car into the water did come "into [the] water from the outside world." *Ibid.*

4. Respondent fares no better in his attempt to distinguish cases from other courts of appeals, in which those courts have recognized that the Act embraces conduct that is indistinguishable from his own. For example, *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 922 (5th Cir. 1983), held that bulldozers and backhoes used to discharge pollutants into navigable waters were "point sources." Without pointing to any language so indicating, respondent simply avers that the case turned on the fact that the bulldozers and backhoes were used "as part of a fixed agricultural activity." Br. in Opp. 37 n.26. In respondent's view, a bulldozer used in agriculture may be a "conveyance," but a personal automobile used to discharge wastes from his (presumably "fixed") commercial blood-testing laboratory is not. The logic of that distinction is, to say the least, elusive.

Respondent's discussion of *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979), is similarly unpersuasive. Respondent suggests that *Earth Sciences* "is not entirely inconsistent" with the decision below, because it did not deal with pollution by an

individual. Br. in Opp. 37. The key point, however, is that the Tenth Circuit's statutory analysis of "point source"—which would cover "any activity that emits pollution from an identifiable point," *Earth Sciences*, 599 F.2d at 373—is certainly broad enough to cover respondent's conduct in discharging pollutants from his car. Respondent also notes that certiorari was not sought in *Earth Sciences*, and that the case "has been criticized in any event." Br. in Opp. 37. If respondent believes that the Second Circuit's ruling in this case vindicates any valid criticism of the Tenth Circuit's approach, that is a reason *for*, rather than against, review by this Court.

5. Respondent also invokes the rule of lenity, claiming that Congress did not "plainly" outlaw his conduct, because it did not enact a statute that told him in *haec verba* that "[a]ny person who pollutes the navigable waters by placing pollutants in those waters without a permit is guilty of a crime." Br. in Opp. 38. The rule of lenity, however, concerns itself with whether the penal statute that Congress actually passed is ambiguous, not with whether defendants might wish to improve on legislative draftsmanship by positing a statute more to their liking. The Clean Water Act clearly prohibits discharging pollutants without a permit from "any discernible, confined and discrete conveyance." 33 U.S.C. 1362(14). That respondent can claim that he did not violate the Act principally by contending that his car is not a "conveyance" gives a fair measure of just how insubstantial his claim of ambiguity truly is.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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